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# Negligence -- Husband and Wife

Frank M. Dunbaugh III

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# CASES NOTED

## NEGLIGENCE, HUSBAND AND WIFE

In an action brought by a father to recover under the Florida Wrongful Death Statute,<sup>1</sup> which statute allows the father to maintain an action for loss of services and the mental suffering of both the mother and father occasioned by the death of a minor child, *held*, the contributory negligence of the mother is a bar to the entire action. *Klepper v. Breslin*, 83 So.2d 587 (Fla. 1955).

Three possible solutions to the question involved in this case were available to the court. The mother's contributory negligence could act, (1) as a bar to her share only, (2) as a total bar, or (3) as no bar at all. The great majority of jurisdictions hold that the contributory negligence of one or more of several beneficiaries will not defeat a cause of action for wrongful death so as to bar all recovery, if the other beneficiaries are innocent.<sup>2</sup> Most of these jurisdictions hold that the amount of the recovery will be reduced to the extent of the contributorily negligent beneficiary's share.<sup>3</sup> The reasoning behind these decisions seems to be a reluctance to impute the negligence of one beneficiary to the others.<sup>4</sup>

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1. FLA. STAT. § 768.03 (1953).

2. *Stafford v. Roadway Transit Co.*, 70 F. Supp. 555 (D.C. Pa. 1947); *Bowler v. Roos*, 213 Cal. 484, 2 P.2d 817 (1931); *Phillips v. Denver City Tramway Co.*, 53 Colo. 458, 128 Pac. 460 (1912); *Happy Valley Farms v. Wilson*, 192 Ga. 830, 16 S.E.2d 720 (1941); *Lindley v. Sink*, 218 Ind. 1, 30 N.E.2d 456 (1940); *Cruse v. Dole*, 155 Kan. 292, 124 P.2d 470 (1942); *Mattfeld v. Nester*, 226 Minn. 106, 32 N.W.2d 291 (1948); *Los Angeles & S. L. R.R. v. Umbaugh*, 61 Nev. 214, 123 P.2d 224 (1942); *Humphreys v. Ash*, 90 N.H. 223, 6 A.2d 436 (1939); *Pearson v. National Manufacture and Stores Corp.*, 219 N.C. 717, 14 S.E.2d 811 (1941); *Gaus v. Pennsylvania R.R.*, 56 Ohio App. 299, 10 N.E.2d 635 (1937); *Lakeview, Inc. v. Davidson*, 166 Okla. 171, 26 P.2d 760 (1933); *MacDonald v. O'Reilly*, 45 Ore. 589, 78 Pac. 753 (1904); *Nettles v. Southern Ry.*, 211 S.C. 187, 44 S.E.2d 321 (1947); *Tufty v. Sioux Transit Co.*, 70 S.D. 352, 17 N.W.2d 700 (1945); *Anderson v. Memphis Street Ry.*, 143 Tenn. 216, 227 S.W. 39 (1920); *Danville v. Howard*, 156 Va. 32, 157 S.E. 733 (1931); *Stogdon v. Charleston Transit Co.*, 127 W. Va. 286, 32 S.E.2d 276 (1944).

3. *Stafford v. Roadway Transit Co.*, 70 F. Supp. 555 (D.C. Pa. 1947); *Phillips v. Denver City Tramway Co.*, 53 Colo. 458, 128 Pac. 460 (1912); *Cruse v. Dole*, 155 Kan. 292, 124 P.2d 470 (1942); *Mattfeld v. Nester*, 226 Minn. 106, 32 N.W.2d 291 (1948); *Humphreys v. Ash*, 90 N.H. 223, 6 A.2d 436 (1939); *Pearson v. National Manufacture and Stores Corp.*, 219 N.C. 717, 14 S.E.2d 811 (1941); *Gaus v. Pennsylvania R.R.*, 56 Ohio App. 299, 10 N.E.2d 635 (1937); *Anderson v. Memphis Street Ry.*, 143 Tenn. 216, 227 S.W. 39 (1920); *Danville v. Howard*, 156 Va. 32, 157 S.E. 733 (1931); *Stogdon v. Charleston Transit Co.*, 127 W. Va. 286, 32 S.E.2d 276 (1944).

4. *Bowler v. Roos*, 213 Cal. 484, 2 P.2d 817 (1931); *Phillips v. Denver City Tramway Co.*, 53 Colo. 458, 128 Pac. 460 (1912); *Lindley v. Sink*, 218 Ind. 1, 30 N.E.2d 456 (1940); *Humphreys v. Ash*, 90 N.H. 223, 6 A.2d 436 (1939); *Pearson v. National Manufacture and Stores Corp.*, 219 N.C. 717, 14 S.E.2d 811 (1941); *Lakeview v. Davidson*, 166 Okla. 171, 26 P.2d 760 (1933); *MacDonald v. O'Reilly*, 45 Ore. 589, 78 Pac. 753 (1904); *Horne v. Atlantic Coast Line R.R.*, 177 S.C. 461, 181 S.E. 642 (1935); *Tufty v. Sioux Transit Co.*, 70 S.D. 352, 17 N.W.2d 700 (1945); *Anderson v. Memphis Street Ry.*, 143 Tenn. 216, 227 S.W. 39 (1920).

However, the Illinois rule is that the contributory negligence of one beneficiary acts as a total bar to the action.<sup>5</sup> This rule is based on the theory that the damages are indivisible. The Illinois court says that there is a single cause of action and a single assessment of the damages in a gross sum.<sup>6</sup>

The third view allows full recovery despite the contributory negligence of one of the beneficiaries.<sup>7</sup> This theory is based on interpretation of the statutes. Thus, where the statute does not provide that contributory negligence shall act as a bar to the action, some courts will not add this provision.<sup>8</sup> Again, where the right of recovery is only conditional upon the deceased's right of recovery had he lived, some courts reason that the beneficiary's negligence would not have acted as a bar to the deceased's action and therefore should not limit his own action for the deceased's wrongful death.<sup>9</sup>

At first blush it appears from the *Klepper* case<sup>10</sup> that Florida has followed the Illinois rule. However, the same result is reached in jurisdictions following the majority view by applying the doctrine of imputed negligence.<sup>11</sup> The general rule is that the marital relationship does not constitute a sufficient basis for imputing to one spouse the negligence of the other.<sup>12</sup> Where it is found, however, that the negligent spouse was acting as the agent of the other spouse<sup>13</sup> or of the community<sup>14</sup> (in

5. *Peterson v. Cochran & McCluer Co.*, 308 Ill. App. 438, 31 N.E.2d 825 (1941); *Garnhart v. Reeves*, 288 Ill. App. 159, 5 N.E.2d 855 (1937); *Hazel v. Hoopeston-Danville Motor Bus Co.*, 310 Ill. 38, 141 N.E. 392 (1923).

6. *Ibid.*

7. *Wilmot v. McPadden*, 78 Conn. 276, 61 Atl. 1069 (1905); *Danforth v. Emmons*, 124 Me. 156, 126 Atl. 821 (1924); *O'Connor v. Benson Coal Co.*, 301 Mass. 145, 16 N.E.2d 636 (1938); *Hines v. McCullers*, 121 Miss. 666, 83 So. 734 (1920); *Reynolds v. Thompson*, 215 S.W.2d 452 (Mo. 1948); *Herrell v. St. Louis-San Francisco Ry.*, 324 Mo. 38, 23 S.W.2d 102 (1929); *McKay v. Syracuse Rapid Transit Ry.*, 208 N.Y. 359, 101 N.E. 885 (1913).

8. *Danforth v. Emmons*, 124 Me. 156, 126 Atl. 821 (1924); *O'Connor v. Benson Coal Co.*, 301 Mass. 145, 16 N.E.2d 636 (1938); *McKay v. Syracuse Rapid Transit Ry.*, 208 N.Y. 359, 101 N.E. 885 (1913).

9. *Danforth v. Emmons*, 124 Me. 156, 126 Atl. 821 (1924); *Hines v. McCullers*, 121 Miss. 666, 83 So. 734 (1920); *McKay v. Syracuse Rapid Transit Ry.*, 208 N.Y. 359, 101 N.E. 885 (1913).

10. *Klepper v. Breslin*, 83 So.2d 587 (Fla. 1955).

11. *Agdeppa v. Clougie*, 71 Cal. App. 2d 463, 162 P.2d 944 (1945); *Wheat's Adm'r. v. Gray*, 309 Ky. 593, 218 S.W.2d 400 (1949); *Darbrinsky v. Pennsylvania Co.*, 248 Pa. 503, 94 Atl. 269 (1915); *Nichols v. Nashville Housing Authority*, 187 Tenn. 683, 216 S.W.2d 694 (1949); *accord*, *Phillips v. Denver City Tramway Co.*, 53 Colo. 458, 128 Pac. 460 (1912); *Los Angeles & S. L. R.R. v. Umbaugh*, 61 Nev. 214, 123 P.2d 224 (1942); *MacDonald v. O'Reilly*, 45 Ore. 589, 78 Pac. 753 (1904).

12. *Phillips v. Denver City Tramway Co.*, 53 Colo. 458, 128 Pac. 460 (1912); *Bessett v. Hackett*, 66 So.2d 694 (Fla. 1953); *Los Angeles & S. L. R.R. v. Umbaugh*, 61 Nev. 214, 123 P.2d 224 (1942); *Lakeview, Inc. v. Davidson*, 166 Okla. 171, 26 P.2d 760 (1933); *MacDonald v. O'Reilly*, 45 Ore. 589, 78 Pac. 753 (1904); *Danville v. Howard*, 156 Va. 32, 157 S.E. 733 (1931).

13. Cases cited note 11 *supra*.

14. *Dull v. Atchison, T. & S. F. Ry.*, 27 Cal. App. 2d 473, 81 P.2d 158 (1938); *Ostheller v. Spokane & I. E. R.R.*, 107 Wash. 678, 182 Pac. 630 (1919); *Crevelli v. Chicago, M. & St. P. Ry.*, 98 Wash. 42, 167 Pac. 66 (1917).

community property states) in the matter at hand, the negligence is imputed to the innocent spouse barring the recovery of both.<sup>15</sup>

Florida has never before ruled on the issue presented by the instant case. The few cases in this jurisdiction considering the question of imputed negligence<sup>16</sup> indicate there was no doubt that Florida adhered to the *principle* that the marital relation, in itself, has no effect in imputing negligence to the other spouse.<sup>17</sup> In this case did the court apply the Illinois view, did they combine the majority view with the doctrine of imputed negligence, or did they conclude that the father himself was also contributorily negligent? It appears they tried to apply all three. They specifically point out that the recovery is indivisible.<sup>18</sup> Almost as clear is their implication that in caring for the children the mother is acting as her husband's agent.<sup>19</sup> Then, in conclusion, the court states the rule as being that ". . . it is proper . . . to assert against the father the defense of contributory negligence grounded upon the negligent acts or failure to act of the wife and mother of *which the father has knowledge or should have had knowledge.*"<sup>20</sup> (Emphasis added)

The charge to the jury was to the effect that if the mother of the deceased child was guilty of negligence that proximately contributed to causing the accident and injury, the jury should return a verdict for the defendant.<sup>21</sup> In holding this charge proper it appears the Florida Supreme Court either followed the Illinois rule, decided as a matter of law that in caring for the children the mother was acting as the father's

15. American Jurisprudence states the rule thusly:

. . . (T)he rule supported by the majority of cases is that the negligence of one parent contributing to the death of a child is not to be imputed to the other parent . . . where the negligent parent is not the agent of the other beneficiary in the matter in hand and where they are not jointly engaged in the prosecution of a joint enterprise. The mere fact that, incidentally, the negligent spouse may derive some benefit from a recovery by the other does not effect the rule. 16 Am. Jur., *Death* § 135 (1938).

16. *Arline v. Brown*, 190 F.2d 180 (5th Cir. 1951); *Sea Board Air Line Ry. v. Watson*, 94 Fla. 571, 113 So. 716 (1927); *Tampa Electric Co. v. Bazemore*, 85 Fla. 164, 96 So. 297 (1923).

17. "But there appears to be little or no dissent to the proposition that the negligence of the husband is not to be imputed to the wife unless he is her agent in the matter in hand, or they are jointly engaged in the prosecution of a common enterprise. The mere existence of the marital relation will not have the effect to impute the negligence of the husband to the wife." *Sea Board Air Line Ry. v. Watson*, 94 Fla. 571, 579, 113 So. 716, 719 (1927).

18. "It should be noted that the recovery is . . . indivisible; that is to say, there is no apportionment between the parents. The father alone is . . . permitted to recover one sum which serves as compensation for his own suffering and also for the suffering of his wife." *Klepper v. Breslin*, 83 So.2d 587, 591 (Fla. 1955).

19. ". . . [S]o far as the father is concerned in the normal family relationship it cannot be denied that in his absence and oftentimes in his presence, he recognizes the peculiar qualities of the mother to care for and supervise the conduct of an infant and to that extent he endows her with all of the authority that he himself might enjoy and otherwise assert in the matter of supervising his child and its conduct." *Klepper v. Breslin*, 83 So.2d 587, 593 (Fla. 1955).

20. *Id.* at 593.

21. *Id.* at 590.

agent,<sup>22</sup> or decided as a matter of law that the father's knowledge of the mother's negligence constituted contributory negligence on his part.

In this case of first impression the Florida Supreme Court seems needlessly to have missed the opportunity to clarify its position. Without weighing the merits of the conflicting views, it appears, none the less, that a clear alignment with one of the lines of authority would have been a positive good in and of itself.

FRANK M. DUNBAUGH III

## LAST CLEAR CHANCE—COMPARATIVE NEGLIGENCE

Plaintiff sued for the wrongful death of her husband arising out of a collision between the deceased's truck and the defendant's train. The jury gave a verdict for the plaintiff based on the judge's charge embodying the doctrine of last clear chance. On appeal, reversed. *Held*, the doctrine of last clear chance no longer applies to railroad comparative negligence cases.<sup>1</sup> *Loftin v. Nolin*, 86 So.2d 161 (Fla. 1956).

At common law, when a defendant is successful in establishing the defense of contributory negligence, it serves as a complete bar to recovery.<sup>2</sup> The hardship of the doctrine of contributory negligence upon the plaintiff has led to various efforts to avoid it. The most commonly accepted modification of the strict rule of contributory negligence is the doctrine of last clear chance,<sup>3</sup> which had its origin in 1842 in the English case of *Davies v. Mann*.<sup>4</sup> The rationale of the doctrine is that the last wrongdoer is necessarily the worst wrongdoer, or at least the decisive one, and should pay.<sup>5</sup> An entirely different approach used to avoid the complete bar of contributory negligence and last clear chance is the doctrine of comparative

22. See *Agdeppa v. Clougie*, 71 Cal. App. 2d 463, 162 P.2d 944 (1945); *Wheat's Adm'r. v. Gray*, 309 Ky. 593, 218 S.W.2d 400 (1949); *Darbrinsky v. Pennsylvania Co.*, 248 Pa. 503, 94 Atl. 269 (1915); *Nichols v. Nashville Housing Authority*, 187 Tenn. 683, 216 S.W.2d 694 (1949). *Contra*, *Phillips v. Denver City Tramway Co.*, 53 Colo. 458, 128 Pac. 460 (1912); *Herrell v. St. Louis-San Francisco Ry.*, 324 Mo. 38, 23 S.W.2d 102 (1929); *Los Angeles & S. L. R.R. v. Umbaugh*, 61 Nev. 214, 123 P.2d 224 (1942); *Humphreys v. Ash*, 90 N.H. 223, 6 A.2d 436 (1939); *MacDonald v. O'Reilly*, 45 Ore. 589, 78 Pac. 753 (1904); *Home v. Atlantic Coast Line R.R.*, 177 S.C. 461, 181 S.E. 642 (1935).

1. By statute in Florida [FLA. STAT. § 768.06 (1953)] the doctrine of comparative negligence is applied in railroad cases.

... If the plaintiff and the agents of the [railroad] company are both at fault, the former may recover, but the amount of recovery shall be such a proportion of the entire damages sustained as the defendant's negligence bears to the combined negligence of the plaintiff and the defendant.

2. RESTATEMENT, TORTS § 467 (1934).

3. The most often stated explanation of the doctrine of last clear chance is that if the defendant has the last clear opportunity to avoid the harm, the plaintiff's negligence is not a proximate cause of the result. *Nehring v. Connecticut Co.*, 86 Conn. 109, 84 Atl. 301 (1912); *Rottman v. Beverly*, 183 La. 947, 955, 165 So. 153 (1936); *Fuller v. Illinois Central Ry.*, 100 Miss. 705, 716, 56 So. 783 (1911); *Bragg v. Central New England Ry.*, 228 N.Y. 54, 126 N.E. 253 (1920).

4. 10 M. & W. 546, 152 Eng. Rep. 588 (Ex. 1842).

5. PROSSER, TORTS at 292 (1955).